

Rebecca K. Smith
Public Interest Defense Center, P.C.
P.O. Box 7584
Missoula, MT 59807
(406) 531-8133
publicdefense@gmail.com

Timothy M. Bechtold
Bechtold Law Firm, PLLC
P.O. Box 7051
Missoula, MT 59807
(406) 721-1435
tim@bechtoldlaw.net

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

**ALLIANCE FOR THE WILD
ROCKIES,**

Plaintiff,

v.

U.S. FISH & WILDLIFE SERVICE, an
agency within the U.S. Department of
Interior.

Defendant.

CV-

**COMPLAINT FOR
DECLARATORY and
INJUNCTIVE RELIEF**

Freedom of Information Act

I. INTRODUCTION

1. Plaintiff Alliance for the Wild Rockies (Alliance) brings this action under the Freedom of Information Act, 5 U.S.C. § 552 et seq. (FOIA) for declaratory, injunctive and other appropriate relief to enjoin Defendant from withholding requested documents and require that Defendant produce those documents.
2. Defendant violated the FOIA by failing to respond to Plaintiff's FOIA request within the deadline established by the FOIA, as well as by failing to produce requested documents within the deadline established by the FOIA. This action seeks the following: (1) an order declaring that Defendant acted illegally by failing to respond to Plaintiff's FOIA request; (2) an order declaring that Defendant acted illegally by failing to produce the requested documents; (3) an order enjoining Defendant from withholding the requested documents and requiring Defendant to produce the requested documents; and (4) an order requiring Defendant to pay the expenses of this action, including Plaintiff's costs and reasonable attorney fees.

II. JURISDICTION AND VENUE

3. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court

also has jurisdiction over this action pursuant to 28 U.S.C. § 1331(a) (federal question).

4. Venue in this District is proper under 5 U.S.C. § 552(a)(4)(B) because “the complainant resides” in this District.
5. Declaratory relief is appropriate under 28 U.S.C. § 2201. Injunctive relief is appropriate under 28 U.S.C. § 2202 and 5 U.S.C. 552(a)(4)(B).
6. This Court has the authority to award costs and attorneys' fees under 5 U.S.C. § 552(a)(4)(E).

III. PARTIES

7. Plaintiff ALLIANCE FOR THE WILD ROCKIES (Alliance) is a tax-exempt, non-profit public interest organization dedicated to the protection and preservation of the native biodiversity of the Northern Rockies Bioregion, its native plant, fish, and animal life, and its naturally functioning ecosystems. Its registered office is located in Missoula, Montana. Members of the Alliance observe, enjoy, and appreciate Montana’s native wildlife, water quality, and terrestrial habitat quality, and expect to continue to do so in the future. Alliance’s members’ interests are directly affected by Defendant’s failure to respond to requests for, and disclose, information regarding natural resource management.

8. Defendant UNITED STATES FISH & WILDLIFE SERVICE (FWS or Defendant) is an agency of the United States Department of Interior. FWS is the agency in possession and control of the records sought by Plaintiff, and as such, is subject to FOIA pursuant to 5 U.S.C. § 552(e). FWS has a statutory duty to respond to Plaintiff's information requests, and disclose the requested records. 5 U.S.C. § 552 (a)(6)(A).

IV. FACTUAL AND LEGAL BACKGROUND

9. On April 2, 2013, Alliance sent a FOIA request by email to FWS at their Montana field office, stating, in relevant part:

We submit this FOIA request for the entire project file for your 2012 [Endangered Species Act] consultation regarding the hazing of Yellowstone bison and its potential effects on threatened grizzly bears. We anticipate that the project file will include, at least, the following: (1) the final analysis documents (biological evaluation/assessment and letter of concurrence); (2) all documents cited in or reviewed for the analysis, (3) all draft analysis documents and comments/discussions regarding drafts, (4) all correspondence regarding the analysis, including emails, letters, and records of phone calls, (5) all notes/minutes from meetings discussing the analysis, and (6) all documentation regarding discussions regarding whether to have a public comment period for this analysis

Attachment 1.

10. On April 19, 2013, a FWS employee acknowledged the request via email, notified Plaintiff of the tracking number for the request, and indicated that the request would be forward to another office. Attachment 2.
11. The April 19, 2013 FWS email did not provide a determination as to Plaintiff's request.
12. The April 19, 2013 email did not provide any of the requested documents.
13. The April 19, 2013 did not indicate when FWS would issue a determination.
14. The April 19, 2013 email did not indicate whether FWS was requesting an extension of time to issue a determination and/or provide responsive documents.
15. As of the date of the filing of the Complaint, FWS has not yet provided Plaintiff with a determination or any requested documents.
16. FOIA requires that an agency determine whether to comply with a request for documents within 20 business days of receipt of the request. If the agency determines not to disclose documents to a requester, it must inform the requester of its decision and inform the requester, at that time, how to appeal the agency's decision. 5 U.S.C. § 552((a)(6)(A)(i).

17. The statutory deadline for Defendant to respond to the above-quoted request, i.e. 20 business days from receipt of the request on April 2, 2013, was April 30, 2013.
18. The FOIA allows 10 additional business days for a determination if the component of the agency that receives the FOIA request is not “the appropriate component of the agency,” and must forward the request to the appropriate component of the agency.
19. If that exception applies, the deadline for Defendant’s response was May 14, 2013.
20. The Department of Interior’s FOIA regulations state that “[t]o make a request for Department records, you must write directly to the bureau that you believe maintains those records.”
21. The Department of Interior’s FOIA regulations state that “A request to a particular bureau component (*for example, a request addressed to a regional or field office*) will be presumed to seek only records from that particular component.” (Emphasis added).
22. The Department of Interior’s FOIA regulations state “If a request to a bureau states that it seeks records *located at another specific component* of the same

bureau, the appropriate FOIA contact *will forward the request to the other component.*” (Emphases added).

23. Plaintiff believes that the FWS Montana field office maintains the records requested and only sought records from the FWS Montana field office. Therefore, Plaintiff wrote directly to the FWS Montana field office, which was the “appropriate component of the agency” in this case.
24. Plaintiff did not wish to delay the process by sending the request to a different component of the FWS in a different state and waiting for that component to forward the request.
25. Thus, as indicated in the regulations, the Montana field office was an appropriate “particular bureau component” from which to request records, and the above exemption, allowing ten additional days for mis-directed requests, does not apply.
26. Plaintiff is directly and adversely affected by Defendant’s failure to respond and provide all responsive records and documents for its FOIA request.
27. Plaintiff is “deemed to have exhausted [its] administrative remedies” because Defendants “fail[ed] to comply with the applicable time limit provisions” of the FOIA. 5 U.S.C. § 552(a)(6)(C)(i).

28. Plaintiff has been required to expend costs and retain legal representation to prosecute this action.

V. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Defendant violated FOIA by failing to issue a determination for

Plaintiff's FOIA Request by the statutory deadline.

29. Plaintiff incorporates all previous paragraphs by reference.
30. Defendant violated FOIA's requirement that an administrative agency must respond to a FOIA request within 20 business days with a substantive determination that notifies the requester whether the agency will comply with the request, the scope of the documents the agency will produce, whether any exemptions are being claimed to deny any part of the request, and how to appeal an adverse determination. 5 U.S.C. § 552(a)(6)(A)(I).
31. Alternatively, if the 10 day extension for mis-directed requests applies, Defendants have also violated that deadline.
32. Plaintiff is entitled to reasonable costs of litigation, including attorney fees pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

SECOND CLAIM FOR RELIEF

Defendant violated FOIA by failing to make requested

records promptly available to Plaintiff.

33. Plaintiff incorporates all previous paragraphs by reference.
34. Defendant violated FOIA because its failure to provide the documents requested by Plaintiff violated the FOIA requirement that every administrative agency “make the records promptly available to any person” who requests records from an administrative agency. 5 U.S.C. § 552(a)(3)(A).
35. Unless enjoined by this Court, Defendant will continue to violate Plaintiff’s legal rights to access the records that it has requested.
36. Plaintiff is entitled to reasonable costs of litigation, including attorney fees pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

VI. REQUEST FOR RELIEF

THEREFORE, Plaintiff requests that this Court enter judgment providing the following relief:

- A. Declare that Defendant violated FOIA by failing to issue a determination for Plaintiff’s FOIA request in accordance with the statutory deadline;
- B. Declare that Defendant violated FOIA by failing to promptly produce the documents requested in Plaintiff’s FOIA request;
- C. Enjoin Defendant from withholding the requested records, and order Defendant to immediately provide the requested records to Plaintiff;

- D. Award Plaintiff its reasonable costs, litigation expenses and attorney's fees as provided by 5 U.S.C. § 552(a)(4)(E); and
- E. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted this 28th Day of May, 2013.

/s/ Rebecca K. Smith

Rebecca K. Smith

Public Interest Defense Center, P.C.

Timothy M. Bechtold

Bechtold Law Firm, PLLC

Attorneys for Plaintiff

ATTACHMENT 1

From: talasi brooks <talasi.brooks@gmail.com>
Subject: FOIA request, Yellowstone bison
Date: April 2, 2013 12:17:44 PM MDT
To: anne_vandehey@fws.gov, MontanaFieldOffice@fws.gov, pj_white@nps.gov, dan_wenk@nps.gov
Bcc: [REDACTED]

U.S. Fish and Wildlife Service,
Montana Ecological Services Field Office
585 Shepard Way
Helena, Montana 59601
anne_vandehey@fws.gov, MontanaFieldOffice@fws.gov

National Park Service, Yellowstone National Park
PO Box 168
Yellowstone National Park
Wyoming 82190
pj_white@nps.gov, dan_wenk@nps.gov

April 2, 2013

Dear Ms. Vandehey, Mr. White and Mr. Wenk:

Pursuant to the federal Freedom of Information Act (5 U.S.C. 552 et. seq.), the Alliance the Wild Rockies, Inc. is filing this request for information. The Alliance for the Wild Rockies is a 501(c)(3) non-profit, public interest, public education organization. Please let us know if you require we submit this request by certified mail.

We submit this FOIA request for the entire project file for your 2012 ESA consultation regarding the hazing of Yellowstone bison and its potential effects on threatened grizzly bears. We anticipate that the project file will include, at least, the following: (1) the final analysis documents (biological evaluation/assessment and letter of concurrence); (2) all documents cited in or reviewed for the analysis, (3) all draft analysis documents and comments/discussions regarding drafts, (4) all correspondence regarding the analysis, including emails, letters, and records of phone calls, (5) all notes/minutes from meetings discussing the analysis, and (6) all documentation regarding discussions regarding whether to have a public comment period for this analysis.

If you choose to withhold any of these requested documents, you must provide us with a Vaughn index that individually lists the name of each and every withheld document and the specific exemption under FOIA under which you believe you are legally entitled to withhold that document. We prefer electronic copies of all documents.

To the requester's knowledge, this information is not available from any other federal, state, or public agency required to provide it. In addition, the release of this information will not result in financial benefit to the Alliance for the Wild Rockies or any individuals, groups or organizations.

I hereby request a fee waiver for all search and duplication fees under the FOIA regulations [5 U.S.C. Sec. 552 (a) (4) (A) and 36 CFR 2.19(c) (1)]. The information requested will benefit the citizens of the United States and is for the purpose of public education and to encourage public debate on important policy issues. The requested information will be made available to the public through the Alliance for the Wild Rockies' central office and our website. Information available through the Alliance's office and website is used in press conferences and releases, television and radio interviews, and regional and national publications, and reaches a significant number of individuals nationwide.

The language of the FOIA clearly indicates that Congress intended fees not to be a barrier to private individuals or public interest organizations seeking access to government records. In addition, the legislative history of the FOIA, fee waiver language indicates that Congress intended a liberal interpretation of the phrase "Primarily benefiting the public." This suggests that all fees are to be waived whenever the release of information contributes to public debate on important policy issues. This has recently been affirmed by the US Court of Appeals for the District of Columbia, in *Better Government Association v. Department of State*, 780 F. 2d 86 (D.C. Cir., 1986). In that case, the Court found that under the FOIA, Congress had explicitly recognized the need for non-profit organizations to have free access to government documents and those government agencies cannot impair this free access by charging duplication or search for FOIA information requests (Id. at 89).

I appreciate your help. Thank you for your time.

Sincerely,

/s/ Talasi Brooks, Research Associate
talasi.brooks@gmail.com

Alliance for the Wild Rockies
P.O. Box 505
Helena, MT 59624
[406 459-5936](tel:4064595936)

--

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

From: talasi brooks <talasi.brooks@gmail.com>
Subject: Fwd: FOIA Request on bison hazing
Date: April 19, 2013 9:13:29 AM MDT
To: Rebecca Smith <publicdefense@gmail.com>

ATTACHMENT 2

----- Forwarded message -----

From: FOIA, FWHQ <fwhq.foia@fws.gov>
Date: Fri, Apr 19, 2013 at 6:06 AM
Subject: FOIA Request on bison hazing
To: talasi.brooks@gmail.com
Cc: Johnny Hunt <johnny.hunt@fws.gov>

Dear Ms. Brooks,

This is acknowledgement of receipt of your FOIA request dated April 2, 2013, for the entire project file for the 2012 ESA consultation regarding the hazing of Yellowstone bison and its potential effect on grizzly bears. Your request has been assigned the following tracking number: FWS-2013-00715. Please refer to the tracking number in all correspondence. Your request will be forwarded to the appropriate program or office, the Region 6 FOIA office in Denver, CO, for direct response to you. Thank you.

Privacy Act Notice

Please be advised that any electronic FOIA request you submit and/or your paper FOIA request may be scanned for ease of transfer to the 'office(s) of record' and in order to store in the Department of Interior's (Department) mandatory Electronic FOIA Tracking System. What this means is that we may share any personal information you provide in your request (including electronic address, bank account, charge card or social security number) with others within the Department involved in processing FOIA requests. Though we will make every effort to protect your privacy, we urge you NOT to include any personal information in your request if it is not needed for processing. The Department's FOIA request tracking systems are authorized and included under "DOI—71, Freedom of Information Request File System."

E. Ray McLaughlin, Alternate FOIA Officer
U.S. Fish and Wildlife Service
Division of Information Resources & Technology Mgmt.
4401 N. Fairfax Drive, Mailstop Rm 380
Arlington, Virginia 22203

--

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]